

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALLSTATE INSURANCE CO. ) Case No. 14-CV-01804 SC  
)  
Plaintiff, ) ORDER GRANTING DEFENDANTS'  
) MOTION FOR ABSTENTION FROM  
) HEARING DECLARATORY RELIEF  
) ACTION  
v. )  
TUCKNOTT ELECTRIC CO., INC.; )  
ROBERT ALLEN TUCKNOTT, JOSE SAMUEL )  
MOLINA, and ELIDIA DIAZ MOLINA )  
Defendants. )  
)  
)  
)  
)  
)  
-----  
)

I. INTRODUCTION

Now before the Court is Defendants Samuel Molina and Elidia Diaz Molina's motion seeking abstention from hearing this declaratory relief action filed by Plaintiff Allstate Insurance Company ("Allstate"). ECF No. 18 ("Mot."). Defendant Robert Tucknott joins in the motion. ECF No. 21 ("Joinder"). The motion is opposed, fully briefed,<sup>1</sup> and appropriate for resolution without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons

---

<sup>1</sup> ECF Nos. 20 ("Opp'n"); 22 ("Reply").

1 set forth below the motion is GRANTED and the complaint is  
2 DISMISSED without prejudice.  
3

4 **II. BACKGROUND**

5 This is an insurance coverage dispute arising from an  
6 automobile-bicycle accident. Tucknott was driving his automobile  
7 when his vehicle struck the Molinas. Following the accident, the  
8 Molinas filed suit in state court ("the Underlying Action") against  
9 Tucknott and several of his companies, including Tucknott Electric,  
10 which was the named insured in an Allstate Business Auto Policy  
11 ("the Policy"). After the suit was filed, Tucknott Electric and  
12 Tucknott tendered the suit to Allstate. Allstate agreed to defend  
13 Tucknott and Tucknott Electric, while nevertheless reserving the  
14 right to argue that no coverage exists.

15 Allstate then brought this declaratory judgment action seeking  
16 a court order resolving its coverage obligations. In this motion,  
17 Defendants argue that the Court should decline to hear Allstate's  
18 declaratory judgment action, and instead dismiss the case in favor  
19 of having the issue heard in state court.  
20

21 **III. LEGAL STANDARDS**

22 **A. Declaratory Judgment**

23 The Declaratory Judgment Act, 28 U.S.C. Section 2201(a)  
24 provides that "[i]n a case of actual controversy within its  
25 jurisdiction . . . any court of the United States . . . may declare  
26 the rights and other legal relations of any interested party  
27 seeking such declaration, whether or not further relief is or could  
28 be sought." The purpose of the Declaratory Judgment Act is to

1 "bring[] to the present a litigable controversy, which otherwise  
2 might only be tried in the future." Societe du Conditionnement en  
3 Aluminium v. Hunter Eng'g Co., Inc., 655 F.2d 938, 943 (9th Cir.  
4 1981).

5       **B. Abstention under the Declaratory Judgment Act**

6       "By the Declaratory Judgment Act, Congress sought to place a  
7 remedial arrow in the district court's quiver; it created an  
8 opportunity, rather than a duty, to grant a new form of relief to  
9 qualifying litigants." Wilton v. Seven Falls Co., 515 U.S. 277,  
10 288 (1995). Two cases, Brillhart v. Excess Insurance Co. of  
11 America, 316 U.S. 491, 495 (1942) and Wilton, explain the  
12 circumstances in which district courts ought not string that arrow.

13       Under Brillhart/Wilton, courts consider three factors in  
14 determining whether abstention is appropriate ("the Brillhart  
15 factors"): "avoiding 'needless determination of state law issues';  
16 discouraging 'forum shopping'; and avoiding 'duplicative  
17 litigation.'" R.R. Street & Co., Inc. v. Transp. Ins. Co., 656  
18 F.3d 966, 975 (9th Cir. 2011) (quoting Gov't Emps. Ins. Co. v.  
19 Dizol, 133 F.3d 1220, 1224 (9th Cir. 1998)). Although the  
20 Brillhart factors "remain the philosophic touchstone for the  
21 district court," Dizol, 133 F.3d at 1225, they "are not necessarily  
22 exhaustive." Huth v. Hartford Ins. Co. of the Midwest, 298 F.3d  
23 800, 803 (9th Cir. 2002). Other factors that courts have  
24 considered include:

25       ///  
26       ///  
27       ///  
28       ///

[W]hether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a "res judicata" advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider the convenience of the parties, and the availability and relative convenience of other remedies.

Dizol, 133 F.3d at 1225 n.5. None of these factors is dispositive, and district courts have broad discretion in declining to hear declaratory judgment actions "as long as it furthers the Declaratory Judgment Act's purpose of enhancing judicial economy and cooperative federalism." Dizol, 133 F.3d at 1224; see also Huth, 298 F.3d at 802-03.

#### IV. DISCUSSION

Defendants make four arguments in favor of abstention. First, they argue that the Underlying Action involves "overlapping factual questions," and accordingly should be considered a parallel action for the purposes of Brillhart and Wilton. Mot. at 2. Specifically, they argue that the questions of the ownership and operation of the automobile and the liability of Mr. Tucknott's businesses will be at issue in both the Underlying Action and this action. Second, they argue the forum-shopping factor weighs in favor of abstention because Allstate's declaratory judgment action was filed in response to the already-filed Underlying Action in state court. Id. at 3 (citing Wilton, 515 U.S. at 283; Dizol, 133 F.3d at 1225-26). Third, Defendants contend they will be subjected to prejudicial discovery costs by being forced to litigate in both

1 state and federal court. Id. at 2-3. Finally, in addition to the  
2 above factors, Defendants argue the Court can and should consider  
3 that if the Court were to dismiss the declaratory judgment action  
4 no other grounds for federal jurisdiction would remain. Mot. at 2  
5 (citing Md. Cas. Co. v. Knight, 96 F.3d 1284, 1289 (9th Cir.  
6 1995)).

7 Allstate disagrees with each of Defendants' arguments, instead  
8 arguing that there is a presumption in favor of declaratory relief,  
9 and, in any event, Defendants cannot satisfy the Brillhart factors.  
10 First, Allstate points to numerous cases recognizing authority  
11 under the Declaratory Judgment Act to "determine [an insurer's]  
12 obligations to defend and indemnify its insured against a third-  
13 party claim." Opp'n at 4 (collecting cases). Second, Allstate  
14 contends abstention is inappropriate in the absence of a 'parallel'  
15 state court action. Because, in Allstate's view, the Underlying  
16 Action raises distinct factual and legal issues and involves  
17 different parties, abstention is per se inappropriate. Third,  
18 Allstate argues there is no forum-shopping concern here because it  
19 is not (and in its view could not be) a party to the Underlying  
20 Action. Id. at 8 (citing Imperium Ins. Co. v. Unigard Ins. Co., --  
21 F. Supp. 2d --, 2014 WL 1671806, at \*3 (E.D. Cal. Apr. 28, 2014)).  
22 Finally, Allstate states that it, not Defendants, will be  
23 prejudiced if the Court declines to hear this case.

24 As a preliminary matter, the Court can find no support for  
25 Allstate's contention that it is presumptively entitled to  
26 declaratory relief. To the contrary, the decision of whether to  
27 hear a declaratory judgment action is clearly discretionary.  
28 Wilton, 515 U.S. at 288. To be sure, federal courts can and often

1 do elect to hear declaratory judgment actions to determine an  
2 insurer's obligations to defend or indemnify an insured against a  
3 third party claim, and "there is no presumption in favor of  
4 abstention in declaratory actions generally, nor in insurance  
5 coverage cases specifically." Dizol, 133 F.3d at 1225. But the  
6 absence of a presumption in favor of abstention does not render  
7 declaratory relief "presumptively available." Relatedly, Allstate  
8 is also mistaken in its apparent belief that Defendants must show a  
9 "compelling reason" for the Court to decline to hear a declaratory  
10 relief action. Opp'n at 3. Such a rule would effectively  
11 transform the discretionary Brillhart/Wilton standard into the  
12 abstention inquiry under Colorado River Water Conservation District  
13 v. United States, 424 U.S. 800, 813 (1976), which requires a  
14 showing of "exceptional circumstances" in favor of abstention.  
15 Wilton expressly rejected that argument, and reaffirmed Brillhart's  
16 discretionary approach to declaratory judgment jurisdiction. 515  
17 U.S. at 286. Accordingly, the Court will apply no presumption in  
18 favor of hearing this declaratory relief action, and will instead  
19 assess whether to hear the case under the Brillhart factors.

20       **A. Avoiding Needless Determination of State Law Issues**

21       The first factor under Brillhart focuses on whether exercising  
22 jurisdiction over the declaratory judgment action will result in  
23 the needless determination of issues of state law. It is  
24 undisputed that this case raises exclusively questions of state  
25 insurance law. Insurance law is "'an area that Congress has  
26 expressly left to the states through the McCarran-Ferguson Act,'" a  
27 consideration other courts have found compelling in declining  
28 jurisdiction. Advent, Inc. v. Nat'l Union Fire Ins. Co. of

1      Pittsburgh, No. 13-CV-00561-LHK, 2013 WL 3483742, at \*4 (N.D. Cal.  
2      July 8, 2013) (quoting Cont'l Cas. Co. v. Robsac Indus., 947 F.2d  
3      1367, 1371 (9th Cir. 1991), overruled in part on other grounds,  
4      Dizol, 133 F.3d at 1227) (citing 15 U.S.C. § 1011-12 (1988)).  
5      Similarly, because jurisdiction here is solely premised on  
6      diversity of citizenship, "the federal interest is at its nadir."  
7      Cont'l Cas., 947 F.2d at 1371.

8      Accordingly, this factor weighs in favor of abstention.

9      **B. Discouraging Forum-Shopping**

10     The second factor under Brillhart focuses on discouraging  
11    forum-shopping. This factor is "usually . . . understood to favor  
12    discouraging an insurer from forum shopping." Am. Cas. Co. of  
13    Reading v. Krieger, 181 F.3d 1113, 1119 (9th Cir. 1999). One  
14    circumstance generally understood to indicate forum-shopping is a  
15    "reactive" declaratory judgment action filed in federal court  
16    seeking a ruling as to an insurer's obligations under a policy at  
17    issue in a state court action that is, usually because of an  
18    absence of diversity jurisdiction, not removable to federal court.  
19    See Cont'l Cas., 947 F.2d at 1371; see also Dizol, 133 F.3d at 1225  
20    (reaffirming that "federal courts should generally decline to  
21    entertain reactive declaratory actions"). Here the Underlying  
22    Action was the first filed action and does not appear to be  
23    removable to federal court. Compl. ¶¶ 2-6 (stating that all the  
24    parties to the Underlying Action are residents of California).  
25    Nonetheless, Allstate offers two reasons why, in its view, this  
26    should not weigh in favor of abstention.

27     Allstate's first argument can be dispensed with quickly.

28     Allstate argues that it "is not (and could not be) a party to the

1 state court action." Opp'n at 8. Allstate apparently bases this  
2 conclusion on California Evidence Code Section 1155's bars against  
3 the introduction of evidence of insurance coverage "to prove  
4 negligence or other wrongdoing." But California law affords a  
5 similar declaratory remedy to that provided by the Declaratory  
6 Judgment Act. Compare 28 U.S.C. § 2201, with Cal. Civ. P. Code §  
7 1060 (conferring a right of action in Superior Court to obtain a  
8 declaration of one's "rights or duties with respect to another"  
9 under an agreement). As a result, other courts, including the  
10 Ninth Circuit, have dismissed similar arguments, finding instead  
11 that the insurer could simply have filed a state court action for  
12 declaratory relief and sought to relate the two matters. See  
13 Polido, 110 F.3d at 1423 (holding that an insurer could have  
14 brought a declaratory relief action "in a separate action to the  
15 same court that will decide the underlying tort action"); Advent,  
16 2013 WL 3483742, at \*4 ("[S]tate courts are well equipped to issue  
17 a declaratory judgment on a matter that turns solely on questions  
18 of state contract and insurance law."); Great Am. Assur. v.  
19 McCormick, No. C 05-02175 CRB, 2005 WL 3095972, at \*2 (N.D. Cal.  
20 Nov. 15, 2005) (Breyer, J.) ("Great American's argument that it is  
21 not forum-shopping because it needs a determination of its coverage  
22 responsibilities is unavailing. It could have filed a declaratory  
23 relief action in state court in Monterey County where such action  
24 could have been related to and coordinated with the pending state  
25 court actions.")(citing Polido).

26 Allstate's second argument merits more attention. Relying on  
27 a case from the Eastern District of California, Allstate contends  
28 that there is no forum-shopping concern where "[t]he parties to

1 this litigation are not parties to the underlying action and are  
2 not seeking to subvert the state court judgment." Imperium, 2014  
3 WL 1671806, at \*3. With all due respect to the Imperium court, the  
4 Court disagrees. To be sure, one clear circumstance where forum-  
5 shopping is a concern is where a state court loser seeks to  
6 undermine finality by seeking relief in federal court. Cf.  
7 Krieger, 181 F.3d at 1119 (affirming a denial of declaratory relief  
8 to bar "the [d]efendants, who [did] not fare[] well in three  
9 summary judgments in this action, from wiping the slate clean and  
10 starting this litigation anew . . . "). However that is not the  
11 only type of forum-shopping that was a concern in Brillhart,  
12 Wilton, and the other declaratory judgment abstention cases.  
13 Instead, under circumstances such as this one, where the legal  
14 question presented is one of state law, there is a prior, pending  
15 proceeding in state court involving overlapping facts, and there is  
16 an adequate state court procedure for Allstate to obtain a  
17 declaration of its coverage obligations, it should be clear why  
18 Allstate filed in federal rather than state court -- Allstate seeks  
19 what it perceives as a friendly forum.

20 Because this is a reactive declaratory judgment action and  
21 Allstate filed in this court in an effort at forum-shopping, this  
22 factor weighs in favor of abstention.

23 **C. Avoiding Duplicative Litigation**

24 "If there are parallel state proceedings involving the same  
25 issues and parties pending at the time [a] federal declaratory  
26 action is filed, there is a presumption that the entire suit should  
27 be heard in state court." Dizol, 133 F.3d at 1225.

28 Much of Allstate's opposition focuses on the alleged absence

of a parallel action. In Allstate's view, "for the abstention doctrine to apply, a parallel state court action must be pending at the same time as [a] federal declaratory judgment action." Opp'n at 5 (collecting cases) (internal quotation marks omitted). In support of this position, Allstate cites several out-of-jurisdiction cases as well as Polido v. State Farm Mutual Automobile Insurance Co., 110 F.3d 1418, 1423 (9th Cir. 1997), overruled in part on other grounds, Dizol, 133 F.3d at 1227, and Maryland Casualty Co. v. Knight, 96 F.3d 1284, 1288 (9th Cir. 1996).<sup>2</sup> Yet none of the controlling authorities cited support Allstate's proposition. For instance, in Polido, the Ninth Circuit stated that "in determining whether to exercise its discretionary jurisdiction to reach the merits in an action for declaratory relief, the dispositive question is not whether the pending state proceeding is 'parallel,' but rather whether there was a procedural vehicle available to the insurance company in state court to resolve the issues raised in the action filed in federal court." 110 F.3d at 1423. Similarly, while Maryland Casualty refers to cases involving parallel proceedings as "the primary instance" in which a court should abstain from hearing a declaratory judgment action, that case nowhere suggests a parallel proceeding is a necessary precondition for abstention. 96 F.3d at 1288. Instead, the Ninth Circuit has clearly stated that "the absence of a parallel state proceeding is not necessarily dispositive; the potential for such a proceeding may suffice." Golden Eagle Ins.

<sup>2</sup> Allstate also cites Security Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1009 (9th Cir. 1997), however that case does not reference, analyze, or discuss Wilton or Brillhart at all, and instead involves an entirely different branch of abstention doctrine.

1       Co. v. Travelers Cos., 103 F.3d 750, 754 (9th Cir. 1996), overruled  
 2       in part on other grounds, Dizol 133 F.3d at 1227; see also Wilton,  
 3       515 U.S. at 290 (declining to "delineate the outer boundaries" of  
 4       district court discretion to deny declaratory relief, including  
 5       under circumstances "in which there are no parallel state  
 6       proceedings").

7           Even setting aside the question of whether abstention is ever  
 8       appropriate where there is no pending parallel state court  
 9       proceeding, Allstate interprets 'parallel' too narrowly. Allstate  
 10      suggests, relying on language from Wilton, that "because this  
 11     action and the Underlying Action do not involve the 'same issues'  
 12     or the 'same parties,' they are manifestly not 'parallel.'" Opp'n  
 13    at 5 (quoting Wilton, 515 U.S. at 282). However the portion of  
 14    Wilton on which Allstate relies does not impose such a rigid  
 15    parallelism requirement. Instead, the quoted language from Wilton  
 16    merely explains the holding in Brillhart that "at least where  
 17    another suit involving the same parties and presenting an  
 18    opportunity for ventilation of the same state law issues is pending  
 19    in state court," the district court should consider abstention.  
 20    See 515 U.S. at 282. Furthermore, also contrary to Allstate's  
 21    view, "[t]he Ninth Circuit construes 'parallel actions' liberally.  
 22    Underlying state actions need not involve the same parties nor the  
 23    same issues to be considered parallel."<sup>3</sup> Keown v. Tudor Ins. Co.,

---

24       <sup>3</sup> Other courts appear to impose a stricter parallelism standard  
 25       than the Ninth Circuit. See, e.g., Scottsdale Ins. Co. v. Detco  
Indus. Inc., 426 F.3d 994, 997 (8th Cir. 2005) (considering  
 26       parallel proceedings a "threshold issue" and finding parallelism  
 27       only if "substantially the same parties litigate substantially the  
 28       same issues in different forums") (quoting New Beckley Mining Corp.  
v. Int'l Union, United Mine Workers of Am., 946 F.2d 1072, 1073  
 29       (4th Cir. 1991)); Clay Reg'l Water v. City of Spirit Lake, 193 F.  
 30       Supp. 2d 1129, 1137 (N.D. Iowa 2002) (stating that "a parallel

1 621 F. Supp. 2d 1025, 1037 (D. Haw. 2008) (citations omitted).  
2 Instead, "[i]t is enough that the state proceedings arise from the  
3 same factual circumstances" as the declaratory judgment action.  
4 Golden Eagle, 103 F.3d at 755 (citing Am. Nat'l Fire Ins. Co. v.  
5 Hungerford, 53 F.3d 1012, 1017 (9th Cir. 1995), overruled in part  
6 on other ground, Dizol, 133 F.3d at 1227). Furthermore, the fact  
7 that an insurer is not a party to the underlying state court  
8 proceeding is immaterial. See Clarendon Am. Ins. Co. v. Sorg  
9 Corp., No. 07-1966 SC, 2007 WL 1880291, at \*2 (N.D. Cal. June 29,  
10 2007) (Conti, J.) ("[T]he Ninth Circuit has found that state court  
11 actions not involving the insurance carrier were sufficiently  
12 parallel to the declaratory relief action to merit consideration  
13 and dismissal under Brillhart.") (citing Golden Eagle; Emp'rs  
14 Reins. Corp. v. Karussos, 65 F.3d 796, 800 (9th Cir. 1995),  
15 overruled in part on other grounds, Dizol, 133 F.3d at 1227).

16 Here, both this case and the Underlying Action arise from the  
17 same factual circumstances. Reviewing the language of the Policy,  
18 several factual issues appear relevant to both this suit and the  
19 Underlying Action. The Underlying Action involves claims against  
20 Tucknott, Robert A. Tucknott & Associates, Inc., and Tucknott

---

21 state court proceeding is a necessary prerequisite to the use of  
22 either the Colorado River-Moses H. Cone or Brillhart standards of  
23 abstention"). Nevertheless it is unclear how imposing a strict  
24 parallelism requirement would further the twin goals of the  
25 Brillhart line of cases: judicial economy and cooperative  
26 federalism. Such a strict parallelism requirement would certainly  
27 result in abstention in cases involving pure forum-shopping or  
28 reactive declaratory judgment actions, but it might nevertheless  
result in abstention being denied in other desirable cases, for  
instance those involving highly significant issues of state law or  
factually overlapping cases which nonetheless involve distinct  
legal issues and theories. See, e.g., Nat'l Union Fire Ins. Co. of  
Pittsburgh v. Simpson Manuf. Co., 829 F. Supp. 2d 914, 922 (D. Haw.  
2011) (considering the unsettled nature of a particular question of  
Hawaiian law in staying a declaratory judgment action).

1 Electric Company, "either individually or under a theory of  
2 respondeat superior." Mot. at 2. At the time of the accident, it  
3 appears the vehicle Tucknott was driving was registered to "Robert  
4 A Tucknott/Assoc Inc[.]" ECF No. 22 ("Brown Decl.") Ex. C  
5 ("Vehicle Regis."). The Policy at issue provides coverage for,  
6 among other things, "'autos' you lease[d], hire[d], rent[ed] or  
7 borrow[ed]," and, specifically for Mr. Tucknott, even for autos he  
8 did not "own, hire or borrow" so long as the vehicle was not owned  
9 by him individually "or by any member of his or her household."  
10 ECF No. 1 ("Compl.") ¶¶ 14, 17. The relationships between  
11 Tucknott, his businesses, the vehicle, and his activities on the  
12 day of the accident are likely to be relevant both to vicarious  
13 liability and policy interpretation. Accordingly, the Court finds  
14 both disputes arise from the same factual circumstances.

15 Moreover, Allstate's argument that "the state and federal  
16 actions involve completely different issues: the state court  
17 proceeding is a personal injury action . . . while this suit  
18 involves the interpretation of Allstate's insurance policy" is  
19 unavailing. "[D]ifferences in factual and legal issues between the  
20 state and federal court proceedings are not dispositive because the  
21 insurer 'could have presented the issues that it brought to federal  
22 court in a separate action to the same court that will decide the  
23 underlying tort action.'" Polido, 110 F.3d at 1423 (quoting  
24 Karussos, 65 F.3d at 800). As the Court previously explained,  
25 there is an available procedural vehicle for Allstate to raise  
26 these issues in state court. See Cal. Civ. P. Code § 1060.

27 Here, the Court finds that the state court in the Underlying  
28 Action is better equipped to resolve this declaratory judgment

1 action. First, as explained above, there is the potential for  
2 several overlapping factual issues. Second, the state court is  
3 more familiar with the parties and the state law issues likely to  
4 arise in interpreting the Policy. Accordingly, this factor also  
5 weighs in favor of abstention.

6 **D. Remaining Factors**

7 Finally, both sides argue they will be prejudiced if the Court  
8 does not adopt their position. Defendants argue the Court should  
9 abstain from hearing this action because exercising jurisdiction  
10 over the declaratory judgment action will result in litigation, and  
11 hence discovery, on two fronts. Mot. at 2-3. Allstate argues that  
12 Defendants overstate the likelihood of duplicative discovery, and  
13 in any event, because the coverage issues would only be resolved in  
14 state court after the merits of the Underlying Action, Allstate  
15 would suffer the bulk of any prejudice by being forced to continue  
16 paying Tucknott's defense costs during the full pendency of the  
17 tort action. Opp'n at 8-10.

18 Allstate's argument is well-taken, but ultimately not enough  
19 to sway the Court from its view that this dispute is better  
20 resolved in state court. Nevertheless, one of the cases cited by  
21 Allstate, Montrose Chemical Corp. v. Superior Court, 25 Cal. App.  
22 4th 902, 910 (Cal. Ct. App. 1994), belies this position. In that  
23 case, the Court of Appeal noted that "[i]n a case where there is no  
24 potential conflict between the coverage issues and the issues in  
25 the third party action, the carrier may obtain an early trial date  
26 in the coverage action," thereby possibly ending its duty to  
27 defend. While Allstate failed to persuade the Court that there is  
28 no potential factual overlap between coverage issues and issues in

1 the Underlying Action, if Allstate continues to believe that to be  
2 the case, it can seek an accelerated resolution of the coverage  
3 issues in state court.

4 As a result, the Court is not persuaded that prejudice weighs  
5 more than weakly against abstention.  
6

7 **V. CONCLUSION**

8 For the reasons set forth above, the Court finds that the  
9 Brillhart factors weigh against the exercise of jurisdiction in  
10 this case and in favor of the resolution of these issues in state  
11 court. Accordingly, Allstate's complaint is DISMISSED without  
12 prejudice.  
13

14 IT IS SO ORDERED.  
15

16 Dated: October 23, 2014

  
UNITED STATES DISTRICT JUDGE